IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DANIEL KROLOW, Appellant, v. LILY KDEP and "JOHN DOE" KDEP, wife and husband, and the marital community composed thereof, Respondents.	)	No. 63136-5-I DIVISION ONE UNPUBLISHED OPINION FILED: March 22, 2010

Grosse, J. — Service of a summons upon an adult relative providing child care is not sufficient to meet the residence requirement needed to effectuate substitute service under RCW 4.28.080(15). The Supreme Court has interpreted "resident" under that statute to require that the person actually live in the home where the summons is served. Accordingly, we affirm the trial court's dismissal for improper service.

FACTS

On November 28, 2007, Daniel Krolow filed a complaint for damages against Lily Kdep for a motor vehicle accident that occurred on December 7, 2004. Service on Lily and "John Doe" Kdep' was attempted on December 29, 2007. The process server left the documents with Chumdl Kdep, who was

babysitting the Kdep children in their home in Federal Way. Chumdl is a 30-year-old married woman who resides with her husband and two step-children in Tacoma. "John Doe" Kdep is her uncle. Chumdl did not tell Lily about the papers, but left them on the table. Lily found the papers there that evening.

The Kdeps' counsel appeared and filed an answer on January 11, 2008. On November 21, 2008, Kdep moved for dismissal on the grounds that the statute of limitations had run because service of process was improper. After hearing oral argument, the court issued a letter opinion granting the motion to dismiss. Krolow moved for reconsideration based on supplemental declarations from Wendy Shanahan, a paralegal for Krolow's counsel and the process server. The court denied reconsideration and awarded fees to the Kdeps. Krolow appeals.

ANALYSIS

A personal injury claim must be commenced within three years.[1] The filing of a complaint in and of itself is not sufficient to toll the statute of limitations. A defendant must be served.[2] The ways in which a person may be served with a summons are set forth in RCW 4.28.080. Generally, personal service is required but substitute service is permitted under certain circumstances.

RCW 4.28.080 provides in pertinent part:

> Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by

[1] RCW 4.16.080.
[2] O'Neill v. Farmers Ins. Co. of Washington, 124 Wn. App. 516, 523, 125 P.3d 134 (2004).

> delivering a copy thereof, as follows:
> ****
> (15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

Thus, in order to effectuate substitute service, Krolow needed to (1) leave a copy of the summons at the Kdeps' house, (2) with some person of suitable age and discretion, (3) then resident therein. The only element at issue here is the third one. "'Resident' requires something more than [being] 'present' in the defendant's usual abode."[3] And as noted by the Supreme Court in Salts v Estes, when the legislature required that service be on a person who is "then resident" in the defendant's usual abode, it meant something more than fleeting occupancy.[4] [T]he usual rule is that service on employees and others who do not reside in the defendant's home does not comport with due process.[5] The Salts[6] court concluded that:

> Even those unlearned in the law would most likely conclude a house of usual abode is somebody's home, even if only on a seasonal basis, and "then resident therein" means a person who is actually living in that house at the time of the service of process.

In Salts, the court held that service of process on a person who was temporarily in the defendant's home to feed dogs and take in mail was insufficient for substitute service of process.

Krolow argues that the term "then resident therein" should be liberally construed. In other words, he argues literal compliance is not necessary so long

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[3] Salts v. Estes, 133 Wn.2d 160, 167-68, 943 P.2d 275 (1997).
[4] 133 Wn.2d 160, 168, 943 P.2d 275 (1997).
[5] Salts, 133 Wn.2d at 168.
[6] 133 Wn.2d at 164.

as the means employed are reasonably calculated to provide notice. He asserts that the facts here are more akin to those found in Sheldon v. Fettig[7] and Wichert v. Cardwell.[8] We disagree.

In Sheldon, a copy of the summons and compliant was left with the defendant's brother at her parents' residence. The court in Sheldon concluded that the defendant maintained two places of usual abode, one at her family home in Seattle and one at her apartment in Chicago, and that her family home was the place where she was most likely to receive notice of the pendency of a suit. The court acknowledged, however, that there are "fact patterns in which serving a defendant at her parent's [home] when she lives elsewhere would not constitute sufficient service of process."[9] Sheldon is distinguishable from the present case. Like Salts, but unlike Sheldon, the issue here is not where the residence is, but rather who resides there for purposes of substituted service. Moreover, even though the Kdeps received actual notice of the pendency of this action, "[n]otice without proper service is not enough to confer jurisdiction."[10]

Likewise, Krolow's reliance on Wichert is misplaced. The Wichert court held that service upon an adult child staying overnight at her parents' home was sufficient service upon the defendant parents.[11] But the Salts court

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[7] 129 Wn.2d 601, 919 P.2d 1209 (1996).
[8] 117 Wn.2d 148, 812 P.2d 858 (1991).
[9] Sheldon, 129 Wn.2d at 611; c.f. Lepeska v. Farley, 67 Wn. App. 548, 557, 833 P.2d 437 (1992) ("service on [defendant] at his parents' home, when he maintained his own separate home, fails to comply with the substitute service statute").
[10] In re Marriage of Logg, 74 Wn. App. 781, 784, 875 P.2d 647 (1994).
[11] 117 Wn.2d at 152.

distinguished Wichert, in part because the daughter accepting service in that case slept in the defendants' home on occasion and in particular the night before she accepted service.[12]

We are constrained to follow Salts as it is the Supreme Court's most recent opinion on the statute. The Salts court noted that both Wichert and Sheldon "mark the outer boundaries of RCW 4.28.80(15)."[13] Courts do not amend statutes by judicial construction.[14] In declining to interpret RCW 4.28.080(15) to include "mere presence in the defendant's home or 'possession' of the premises" the Salts court stated:

> Under such a view, service on just about any person present at the defendant's home, regardless of the person's real connection with the defendant, will be proper. A housekeeper, a baby-sitter, a repair person or a visitor at the defendant's home could be served. Such a relaxed approach toward service of process renders the words of the statute a nullity and does not comport with the principles of due process that underlie service of process statutes.[15]

Clearly, an adult babysitter, even though related, falls outside the parameters set forth in Salts.

Finally, Krolow argues that the process server's declaration that the niece told him she resided at the residence is sufficient to raise a material issue of fact. He argues that a plaintiff may reasonably rely on a person's representations in concluding that the person accepting service of process resides at a particular

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[12] 133 Wn.2d at 169.
[13] 133 Wn.2d at 178.
[14] Salts, 133 Wn.2d at 170.
[15] Salts, 133 Wn.2d at 170.

location. But in Salts, the Supreme Court was not concerned that there, as here, a process server claimed that the person with whom the documents were left was a resident. The statute requires actual residence, not a belief by the process server that the person resides there.

Accordingly, we affirm the trial court.

Grosse, J

WE CONCUR:

Appelwick, J

Cox, J.